

IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF GEORGIA  
MACON DIVISION

HENRY ERIC JOHNSON,  
Petitioner

VS.

ALEXIS CHASE, WARDEN, *et al.*,

Respondents

NO. 5:06-CV-103 (DF)

**PROCEEDINGS UNDER 28 U.S.C. §2254  
BEFORE THE U. S. MAGISTRATE JUDGE**

## **RECOMMENDATION**

Respondent ALEXIS CHASE in the above-styled habeas corpus action has filed a motion to dismiss the action as being both successive and untimely and for the petitioner's failure to exhaust his state remedies. Tab #12. Conceding that his petition is successive, petitioner HENRY ERIC JOHNSON has made a motion for certificate of appealability and moved to stay his petition for writ of habeas corpus pending the petitioner's motion for certificate of appealability. Tab #17.

The AEDPA is very clear on the appropriate timing of a motion for authorization for a district court to consider a successive petition:

Before a second or successive application permitted by this section is **filed** in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application. (Emphasis added.) AEDPA, 28 U.S.C. §2244(b)(3)(A)

Since the petitioner filed his petition before obtaining an order authorizing the district court to file a successive petition, this court lacks jurisdiction to hear this case. While there is at least one case coming from another circuit that permits a petitioner's filing to be transferred to the correct court pursuant to 28 U.S.C. § 1631 (*Lirano v. U.S.*, 95 F.3d 119 (2<sup>nd</sup> Cir. 1996)), such a ruling would be inappropriate here in any case because the petitioner's original filing came unaccompanied by a motion for authorization to file a successive appeal pursuant to §2244(b)(3). *See also Jackson v. Mitchem*, 998 F. Supp 1375 (M.D. Ala., 1998) (Holding that dismissal of a similar habeas petition is the only way to apply Congress' clear language).

Accordingly, IT IS RECOMMENDED that the respondent's Motion to Dismiss (Tab #17) be GRANTED and the petitioner's petition be dismissed *without prejudice* to file for authorization from the Eleventh Circuit. Pursuant to 28 U.S.C. §636(b)(1), the parties may serve and file written objections to this RECOMMENDATION with the district judge to whom this case is assigned **WITHIN TEN (10) DAYS** after being served with a copy thereof.

The clerk of court is directed to forward this order to petitioner at the LAST ADDRESS provided by him.

SO RECOMMENDED, this 6<sup>th</sup> day of DECEMBER, 2006.



A handwritten signature in blue ink that reads "Claude W. Hicks, Jr."

CLAUDE W. HICKS, JR.  
UNITED STATES MAGISTRATE JUDGE